TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 619

WALTER G. QUERY, JOHN P. DERHAM, AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1941.

CERTIORARI GRANTED APRIL 14, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 425

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, United States Army, Individually and as Commanding General, Fort Jackson, S. C., and Major William R. Tomy, United States Army, Individually and as Post Exchange Officer, Fort Jackson, S. C., Complainants,

v.

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as Members of and Constituting the South Carolina Tax Commission, Defendants

AMENDED BILL OF COMPLAINT—Filed January 31, 1941

The complainants above named, by their amended Bill of Complaint, would respectfully show to the Court and allege:

1. At all times herein mentioned, the complainant, The United States of America, was and now is a corporation sovereign and a body politic.

2. The complainants, Henry D. Russell and William R. Tomy, are respectively, Major General and Major in the Army of the United States, and Commanding General and Post Exchange Officer at Fort Jackson, S. C.

3. The defendants, Walter G. Query, John P. Derham and John G. Richards are the duly appointed and acting members of the South Carolina Tax Commission and constitute said Tax Commission, and have as the principal place for the transaction of their official business the City of Columbia, County of Richland, in the State aforesaid, [fol. 3] and within the Eastern Judicial District of South Carolina.

4. The grounds upon which the jurisdiction of this Court depends are that this is a suit of a civil nature brought by

the United States of America, and that this Suit arises under the Constitution and Laws of the United States of America, and the amount in controversy herein exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

5. There are situated at the Navy Yard, in the County of Charleston, State aforesaid, the Post Exchange, Ships' Service Stores, and the Officers' Club. There are situated at Fort Moultrie, in the County of Charleston, State aforesaid, Post Exchanges and an Officers' Club. There are situated at the United States Marine Reservation at Parris Island, in the County of Beaufort, State aforesaid, Post Exchanges, a Non-Commissioned Officers' Club and an Officers' Club. There are situated at Fort Jackson, in the County of Richland, State aforesaid, Post Exchanges, Officers' Clubs, and Commissaries.

6. Act No. 574, Acts of 1928 of the General Assembly of the State of South Carolina, as amended, imposes a license tax upon every person for the exercise of the privilege of engaging in selling within the State certain articles, among them being beer, wine, tobacco products, soft drinks, playing cards and candy. In addition to the license tax graduated in accordance with the volume of the sales, said Act, as amended, necessitates the procurement, for each place of business operated by the licensee of a license, the issuance of which is wholly within the discretion of the members of the South Carolina Tax Commission. The Act is implemented by a power of revocation of license and of seizure of the alleged illicit product together with the seizure of vehicles, not common carriers, bearing such product. A broad regulatory power is vested in the Commission whereunder it is privileged to enter upon the premises of a vender, whether a licensee or not, and examine his books and rec- [fol. 4] ords. The Commission is further empowered to promulgate rules and regulations under the Act, governing its enforcement, the violation of which will result in fine or imprisonment. In addition, those persons procuring licenses are required to maintain extensive files recording minutely the transactions allegedly embraced within the Act. In the instance of the sale of soft drinks, the licensee is required to maintain records of all such transactions for a period of not less that two years from the date of each such transaction.

7. Some of the commodities above mentioned are being purchased, sold and used by the Post Exchanges, Ships' Stores, Ship Service Stores, Clubs and Commissaries aforesaid, all of which are instrumentalities of the United States and/or voluntary unincorporated organizations of Army or Navy personnel, and the aforesaid commodities are distributed to, or sold to, and used by the personnel of the United States Army, Navy and Marine Corps only, in buildings and equipment furnished by the United States under the direction and supervision of the duly constituted officers of the United States Army or Navy and in accordance with rules and regulations promulgated by the Secretary of War and the Secretary of the Navy. None of the profits, if any, derived by the Post Exchanges, Ship Stores, Ship Service Stores, Clubs and Commissaries aforesaid accrue to any individual and the records and funds thereof are audited and checked by duly constituted officers of the United States Army or Navy, and any and all profits, if any, derived from the sale or use of any of the commodities above mentioned are used for the nourishment or recreation and entertainment of such personnel, thereby supplementing necessary appropriations made by the Congress from time to time for those purposes.

[fol. 5] 8. The said defendants claim that certain of the commodities sold by, distributed and used by the aforesaid Post Exchanges, Stores, Clubs and Commissaries are subject to the provisions of Act No. 574, Acts of the General Asembly of the State of South Carolina, as amended, under the provisions of Public No. 819, 76th Cong., 3d. Sess., and have threatened and are threatening to enforce the provisions of the aforesaid South Carolina Act, commencing with the 1st day of January, 1941, and have ordered that the said provisions of the said Act of South Carolina be applied to the purchase and sale of commodities by the aforesaid Post Exchanges, Stores, Clubs and Commissaries all of which, these complainants allege, is contrary and repugnant to the provisions of the Constitution of the United States and in interference with the activities of the United States Government, since the imposition and collection of none of the taxes imposed by Act 574, Acts of 1928 of the General Assembly of the State of South Carolina, as amended, are consented to by Public No. 819, 76th Cong., 3rd Sess., in the case of the Post Exchanges, Stores, Clubs and Com-

missaries aforesaid, or in the case of any voluntary unincorporated organizations of Army or Navy personnel. The complainants claim that the aforesaid commodities sold by, distributed and used by the aforesaid Post Exchanges, Stores, Clubs and Commissaries are not subject to the provisions of the aforesaid South Carolina Act.

9. Unless the enforcement of the said South Carolina Act be enjoined, the complainants and the Army and the Navy personnel at the aforesaid Post Exchanges, Stores, Clubs and Commissaries will be subjected to repeated unlawful proceedings and interference in the performance by them of their lawful duties and functions. The complain- [fol. 6] ants' property will be subjected to unlawful invasion, seizure and confiscation, to the complainants' immediate, permanent and irreparable detriment and loss.

10. The complainants are without any plain, speedy and efficient remedy, either at law or in equity, against the defendants, in the Courts of the State of South Carolina for the aforesaid invasion and attempted invasion against the rights of the complainants, and are in fact without any remedy at law in the premises, and only by a suit in equity and by the injunctive processes of this Court can they be fully protected from the illegal interference by the defendants with the lawful functions performed by the complainants and the Army and Navy personnel at the aforesaid Post Exchanges, Stores, Clubs and Commissaries. Only by the granting of injunctive relief can the confusion, uncertainty, hardship and multiplicity of suits which will be engendered by the enforcement and attempted enforcement of the South Carolina Act by the defendants, be prevented and only in a Court of equity can the necessary relief be adequately obtained. It is therefore necessary to obtain from this Court a Decree enjoining the defendants from enforcing the provisions of the said South Carolina Act as against the aforesaid Post Exchanges, Ships' Stores, Ship Service Stores, Clubs and Commissaries, and that they be likewise enjoined from the enforcement of the said Act against the aforesaid Post Exchanges, Stores, Clubs and Commissaries pending the determination of this proceeding.

Wherefore, complainants pray that the defendants as members of and constituting the South Carolina Tax Commission and their agents, servants and employees be per-

manently enjoined and restrained from enforcing the pro-
[fol. 7] visions of Act No. 574, Acts of 1928, of the General Assembly of the State of South Carolina, as amended, against the Post Exchanges, Ships' Stores, Ships Service Stores, Clubs and Commissaries, as aforesaid, and the purchase, sale or use by them of the commodities enumerated in the aforesaid South Carolina Act, and that this Court adjudge that the provisions of the said South Carolina Act are not applicable to the purchase, sale or use by the aforesaid Post Exchanges, Stores, Clubs and Commissaries, and that, pending the final hearing and determination of this action, this Court grant an interlocutory injunction restraining the defendants, their agents, servants and employees from doing or causing to be done any of the things as to which a permanent injunction is herein prayed for, and for such other and further relief as to the Court may seem proper.

United States of America. Major General Henry D. Russell, United States Army. Major William R. Tomy, United States Army. By C. N. Sapp, United States Attorney, Attorney for Complainants.

[fol. 8] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 425

[Title omitted]

ANSWER AND RETURN TO AMENDED BILL OF COMPLAINT—Filed January 31, 1941

The Defendants above named, for their answer and return to the amended bill of complaint, respectfully show to the Court:

1. Admit all of the allegations contained in paragraph one (1) of the amended bill of complaint.

2. Admit all of the allegations contained in paragraph two (2) of the amended bill of complaint.

3. Admit all of the allegations contained in paragraph three (3) of the amended bill of complaint.

4. Admit all of the allegations contained in paragraph four (4) of the amended bill of complaint.

5. Admit all of the allegations contained in paragraph five (5) of the amended bill of complaint, and allege in addition to the organizations therein alleged to be operated, there are other Officers' Clubs, Post Exchanges, and similar [fol. 9] organizations operating outside of the Charleston Navy Yard, Fort Jackson, and Parris Island, S. C., to-wit, on Hampton Avenue, in the City of Columbia, S. C., in the City limits of Charleston, S. C., and in Spartanburg County, South Carolina.

6. Admit so much of the allegations contained in paragraph six (6) of the amended bill of complaint as allege that under the laws of South Carolina the commodities enumerated in said paragraph are subject to the sale or use tax; also admit that these articles are being sold at Post Exchanges, Ships' Stores, Clubs and Commissaries located in South Carolina; that said organizations are operated under the regulations of the army and navy department; deny that any of the said organizations are instrumentalities of the United States; deny that they sell and distribute such commodities to the personnel only, and allege that private citizens are permitted to purchase these commodities from the various organizations just as they would purchase them from any other mercantile establishment in South Carolina, and also allege that it is contrary to Federal law for beer, wine or intoxicating liquors to be sold or distributed on property used for military purposes. None of the money necessary to operate these organizations is furnished by the United States, none of the profits inure to the United States, all profits, if any there be, are enjoyed by the personnel owning and operating such organizations. Some of the profits are used for the purpose of purchasing equipment to be used in said places of business, and other equipment is loaned or furnished by persons or corporations from whom the stock of merchandise is secured. Defendants deny that they have attempted to require the procurement of a license for each place of business above enumerated, the Act of Congress only permitting [fol. 10] the State to collect its sales, use, and income tax

on Government reservations. Some of the profits are used for the purpose of paying salaries of civilian employees who are hired by such organizations to work in and about the business places of these organizations, just as any other mercantile establishment is operated. There is no Act of Congress requiring or permitting the operation of these Post Exchanges, or similar organizations; but, on the contrary, they are operated under the permission of superior officers of the various departments. Affidavit of P. M. Minus, Director of the License Tax Division of South Carolina Tax Commission, is hereto attached, marked Exhibit "A", and made a part of this answer and return.

7. Deny each and every allegation contained in paragraph seven (7) of the amended bill of complaint, except that taxable commodities are sold in the Post Exchanges, or similar organizations; deny that the defendants are attempting to collect any tax from Commissaries, or Ships' Stores, these two being admittedly stores operated by the United States; deny that Post Exchanges, Ship Service Stores, Officers' Clubs, or noncommissioned Officers' Clubs, are instrumentalities of the United States, regardless of where operated; deny that the commodities in question are distributed to, sold to, and used only by the personnel of the army, navy and marine corps, and allege that under the regulations provided for the operation of these stores many civilians are permitted to make purchases therefrom; and, in addition thereto, other civilians not connected in any wise with the reservations are permitted to make purchases there- [fol. 11] from; allege that the profits, if any, derived from the operating of these organizations do accrue to the membership of the organizations collectively; that if any of the commodities sold or distributed therefrom were necessary for the personnel to have in order that the personnel render proper services to the United States, such commodities would be furnished by the United States.

8. Admit that defendants claim that taxable commodities sold by, distributed and used by the aforesaid organizations, are subject to the tax provided in Act No. 574, Acts of the General Assembly of South Carolina, as amended; admit that defendants are threatening to enforce the provisions of the aforesaid Act, but deny that defendants have threatened to enforce the provisions of this Act

against the Commissaries, or Ships' Stores; deny that the enforcement of this Act against the aforesaid organizations would in any wise interfere with the activities of the United States, or would be in any wise repugnant to any provision of the Constitution of the United States. Defendants allege that none of these organizations are created by Act of Congress and are, therefore, not instrumentalities of the United States, they being non-instrumentalities of the United States, no consent of Congress is necessary to permit the State to levy its lawful tax thereon, the territorial immunity having been removed by Public Act No. 819, 76th Congress.

9. Admit that this Court has jurisdiction to determine the matters here in controversy and to determine whether or not the action of defendants, or the Statute under which they are attempting to proceed are in violation of the Constitution of the United States; deny that there is any attempt to enforce the South Carolina Act against Commissaries or Ships' Stores, and deny that the enforcement of [fol. 12] this Act against Post Exchanges, and similar organizations, will interfere in any manner in the performance by them of their lawful duties and functions. Deny that complainant, United States of America, is involved in any way, or that its property will be subjected to unlawful invasion by the enforcement of the South Carolina Act, inasmuch as the United States owns none of the property involved, it being the sole property of the organizations.

10. Admit that complainants are without any plain, speedy or efficient remedy at law; deny that the United States has any interest in this proceeding and that there will be no interference with the United States by the application of the South Carolina Act to Post Exchanges, and similar organizations, and allege that a bond should be required to protect the State against any loss, pending a final decision in this matter.

Wherefore, defendants, having fully answered and made return to the amended bill of complaint, pray that the same be dismissed, that the temporary restraining order be dissolved, and for such other and further relief as to the Court may seem just and proper.

(S.) John M. Daniel, Attorney General for South Carolina; (S.) Claude K. Wingate, Attorneys for Defendants.

[fol. 13] EXHIBIT "A" TO ANSWER AND RETURN

STATE OF SOUTH CAROLINA,
County of Richland:

AFFIDAVIT OF P. M. MINUS

P. M. Minus, first being duly sworn, deposes and says:

That he is Director of the License Tax Division of South Carolina Tax Commission, and as such has direct supervision of the collection of all licenses, sales, and use taxes levied under the revenue laws of South Carolina.

That some time ago information and complaints came to him that Post Exchanges at Fort Jackson, and other similar organizations, in South Carolina, were making sales in large quantities of tobacco products, and other taxable commodities, to private citizens. Acting upon these complaints and this information, he, along with an employee of his Department, drove out to Fort Jackson and parked in front of one of these Post Exchanges and saw many civilians going in the Post Exchange and purchasing quantities of cigarettes and smoking tobaccco which they carried off with them, and that he also saw taxi drivers carrying off cigarettes by the carton.

That he also observed many civilians purchasing and consuming soft drinks and beer in said Post Exchange.

(S.) P. M. Minus.

Sworn to before me this 31st day of January, A. D., 1941. A. B. Craig (L. S.), Notary Public for South Carolina. (Seal.)

[fol. 14] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

[Title omitted]

STIPULATION AS TO FACTS—Filed April 1, 1941

It is hereby agreed and stipulated by and between the parties hereto as follows:

1. That the Commissaries and Ships' Stores mentioned and described in the bill of complaint are instrumentalities

of the Federal Government, and the Court is requested to so find.

2. That the organization, function and activities of the Post Exchanges of the United States Army mentioned in the bill of complaint in this case are as determined and prescribed in Army Regulations AR 210-65 C. 1 and 3; and that the purpose of the activities of the Army Post Exchanges mentioned in the bill of complaint are as therein described; that the ownership, possession and control of the funds of the Army Post Exchanges mentioned in the bill of complaint are as determined in the above mentioned Army Regulations and by Army Regulations AR 210-50 1-2, all of which are attached hereto as a part hereof.

3. That the Marine Corps Post Exchanges, and the Ships' Service Stores mentioned in the complaint bear the same relationship respectively to the Marine Corps, and the United States Navy that the Army Post Exchanges bear to the United States Army, and that, if it be determined that the Army Post Exchanges mentioned in the bill of [fols. 15-70] complaint are instrumentalities of the Government, then the Court is requested to find that the Marine Corps Post Exchanges and the Ships' Service Stores mentioned in the bill of complaint are also instrumentalities of the Federal Government, it being understood that if it be determined that the Army Post Exchanges mentioned in the bill of complaint are not Federal instrumentalities, then a similar finding in the case of the Marine Corps Post Exchanges and the Ships' Service Stores should be made.

4. It is further stipulated and agreed that in the event that the Court finds that the United States Army Post Exchanges mentioned in the bill of complaint are instrumentalities of the Federal Government, then a similar finding is to be made by the Court with respect to the Officers' Clubs and Noncommissioned Officers' Clubs mentioned in the complaint; and if the Court should find that the United States Army Post Exchanges mentioned in the bill of complaint are not instrumentalities of the Federal Government, then a similar finding is to be made by the Court with respect to the Officers' Clubs and Noncommissioned Officers' Clubs.

5. It is further stipulated and agreed that if the Court shall find that the plaintiffs are entitled to have the defendants enjoined and restrained from collecting the taxes as to the activities of the Post Exchanges, that they also be enjoined and restrained from collecting the taxes as to the Marine Corps Post Exchanges, Ships' Service Stores, the Officers' Clubs and Noncommissioned Officers' Clubs.

6. It is further stipulated and agreed that the allegations in the complaint relative to the cafeteria at the Navy Yard at Charleston, S. C., shall be deemed to have been eliminated therefrom.

7. It is agreed and stipulated that this stipulation and the documents attached hereto as a part hereof constitute all the evidence in this case.

C. N. Sapp, United States Attorney, Attorney for the Plaintiffs. John M. Daniel, Attorney General of S. C.; Claude K. Wingate, Attorney- for the Defendants.

Columbia, S. C., January 31, 1941.

[fol. 71] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

[Title omitted]

Findings of Fact and Conclusions of Law—Filed April 1, 1941

FINDINGS OF FACT

The Court makes the following findings of fact:

1. The Complainants, Henry D. Russell and William R. Tomy, are respectively Major General and Major in the Army of the United States and Commanding General and Post Exchange Officer at Fort Jackson, South Carolina.

2. The Defendants, Walter G. Query, John P. Derham and John G. Richards are the duly appointed and acting members of the South Carolina Tax Commission and con-

stitute said Tax Commission, and have as the principal place for the transaction of their duties the City of Columbia, County of Richland, in the State aforesaid, and within the Eastern Judicial District of South Carolina.

3. There are situated at the Navy Yard, in the County of Charleston, State aforesaid, the Post Exchange, Ships' Service Stores, and Officers' Club. There are situated at [fol. 72] Fort Moultrie, in the County of Charleston, State aforesaid, Post Exchanges and an officers' Club. There are situated at the United States Marine Reservation at Parris Island, in the County of Beaufort, State aforesaid, Post Exchanges, a Non-commissioned Officers' Club and an Officers' Club. There are situated at Fort Jackson, in the County of Richland, State aforesaid, Post Exchanges, Officers' Clubs and Commissaries.

4. Under Army Regulations No. 210-65, promulgated by the Secretary of War, under the authority given to him by Congress, the Commanding Officer of each post is directed to establish and maintain a Post Exchange whenever there is need for it, membership in which is limited to companies, troops, batteries, aero squadrons or other similarly organized units and detachments.

5. The Commanding Officer of each Post Exchange has complete jurisdiction over the conduct of all Exchanges within his command subject to the general supervision of superior authority and is held strictly responsible for their efficient operation and for the enforcement of exchange regulations.

6. Under the Army Regulations sales are made only to officers and enlisted men of the Regular Army, Army nurses, contract surgeons, members of the Reserve Corps while on active duty, officers and enlisted men of the National Guard when in federal service, civilian employees authorized for service abroad, having a status recognized by the War Department as part of an expeditionary force, and civilians employed or serving at military posts.

7. The primary purposes of an Exchange are to supply troops at the lowest possible prices with articles or ordinary use, wear and consumption not supplied by the Government, to afford the means of rational recreation and [fol. 73] amusement, and through exchange profits to pro-

vide, when necessary, the means for improving the company messes.

8. The Commanding Officer of a Post Exchange is charged with the maintenance of recreational athletics, entertainments, service clubs, libraries, and community cooperation.

9. The Post Exchange is governed by a council consisting of a Post Exchange Officer and Commanding Officer of each company, battery, hospital detachment, or similar organization.

10. The Post Exchange Officer is detailed by the Commanding Officer and receives no compensation for his services.

11. Under the Regulations of the Secretary of War the duties imposed upon officers in the management of exchange affairs are as binding upon them as any other duty which they may be assigned under competent military authority.

12. Five per cent of the profits, if any, are set aside as a fund which is divided among the members of the exchange, that is, the companies, troops, batteries, squadrons or units and detachments, and not any individuals, and the balance is set aside as a portion of the recreation fund for the laying out, preparing and cultivating gardens, for the purchase of books, newspapers, periodicals, stationery, and similar articles for the exchange library, gymnastic appliance, and prizes for athletic sports. These funds belong to no particular individual and even the part which is set aside for the individual organizations having membership in the Post Exchange is held by such members in trust subject to the orders of the Secretary of War and to congressional enactments.

13. In 1913 Congress required balances of Post Exchange funds amounting to $298,068.00 to be covered into the Federal Treasury after the military organizations who held these funds were disbanded.

[fol. 74] 14. Buildings have been constructed and recreational facilities set up at posts and are maintained from funds made available by the War Department. The amount of funds so made available is normally dependent on the

amount included in the item "Military Post Exchanges" in the appropriation act for the fiscal year.

15. Commencing with the year 1902 Congress made appropriations practically each year under the title "Military Post Exchange", and the amounts so appropriated for buildings alone aggregates twelve million dollars besides large sums allotted for this purpose from various emergency funds.

16. Where Post Exchange buildings have not been provided from funds otherwise available, the Commanding Officer is authorized to construct temporary buildings by the labor of troops and to use the necessary teams and such tools, windows, sashes, doors, and other material as can be spared by the Quartermaster Corps.

17. The Quartermaster is authorized to sell to the Exchange at cost any subsistence stores except exceptional articles, to furnish heating and suitable apparatus therefor for exchange rooms and buildings, and to provide supplies for interior and exterior illumination.

18. Messages on Post Exchange business over telegraph, radio, and cable lines owned and operated by the War Department may be transmitted without charge and penalty envelopes may be used in conducting Post Exchange correspondence.

19. In 1928 the Legislature of South Carolina passed Act No. 574, under the provisions of which a license tax is imposed on every person selling the articles referred to in the Complaint and requiring such person to secure a license which may be issued or revoked by the defendants.

[fol. 75] 20. Act No. 574, as amended, provides that the commodities named therein, for the privilege of carrying on such business, shall be subject to the payment of license tax which shall be measured by and graduated in accordance with the volume of sales by the person obtaining such license.

21. The Act further provides that the person engaged in the business of buying, selling or distributing the articles therein referred to without having secured the required license shall be guilty of a misdemeanor, that the license taxes shall be paid by affixing stamps at the time and in the

manner set forth in the Act, and that if such commodities are found at the time set forth in the Act in the possession of the licensed person without stamps affixed thereto, they shall become contraband and subject to be seized by the defendants, and that the vehicle owned by anyone other than a common carrier used for the transportation for the purpose of sale or unstamped commodities shall also be subject to confiscation.

22. The Act further provides that the Tax Commission and its agents shall have the power to enter upon the premises of any taxpayer and to examine any books, papers, records or memoranda bearing upon the amount of taxes to be paid, to secure other information directly or indirectly concerned in the enforcement of the provisions of the Act, and directs that such records as may be required by the Tax Commission shall be kept by the taxpayer and shall at all times be subject to the inspection of the Commission and its agents, and imposes penalties for the failure to keep any such records and for refusing to submit the same for the inspection of the Commission and its agents.

23. Army Regulations specify what books and records shall be kept by Post Exchanges and the manner of auditing the same.

[fol. 76] 24. After the passage of Act No. 574 in 1928 the South Carolina Tax Commission did not undertake to enforce the provisions thereof in respect to the agencies and organizations set forth in the complaint herein, but since the passage of Public No. 819, 76th Cong., 3d Sess., the defendants have ruled that the provisions of Act No. 574 passed by the Legislature of South Carolina in 1928, are applicable to the agencies and organizations specified in the complaint and have notified such organizations and agencies that the provisions of such Act would be enforced as against them and have directed its agents to enforce the same and have threatened and are threatening to continue to enforce and to attempt to enforce the same.

Conclusions of Law

And the Court sets forth the following as its conclusions of law:

1. That the Post Exchange at Fort Jackson, South Carolina, is an instrumentality of the Federal Government.

2. That the Post Exchange at Fort Jackson, South Carolina, and its transactions are not subject to state taxation.

3. That the taxes imposed by Act No. 574, Acts of 1928 of the General Assembly of the State of South Carolina, as amended, are inapplicable to the Post Exchange at Fort Jackson, South Carolina, or its transactions.

4. That Congress, by Act of October 9, 1940, Public No. 819, 76th Cong., 3d Sess., did not subject the Post Exchange at Fort Jackson, South Carolina, to state, sales, use or income taxation.

5. That the complainants have no plain, speedy, and efficient remedy at law or in equity in the courts of the state of South Carolina.

[fol. 77] 6. That the complainants are entitled to a permanent injunction restraining the defendants as members of and constituting the South Carolina Tax Commission and their agents or employees from enforcing or attempting to enforce the provisions of Act No. 574, as amended, with respect to the Post Exchange at Fort Jackson, South Carolina, or its transactions.

7. That the complainants are entitled to the declaratory judgment prayed for in the Amended Bill of Complaint.

(S.) John J. Parker, United States Circuit Judge, Fourth Circuit. Johnson J. Hayes, United States District Judge for Middle District of North Carolina. Alva M. Lumpkin, United States District Judge for the Eastern and Western Districts of South Carolina.

This the 31st day of March, 1941.

[fol. 78] DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

[File endorsement omitted]

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, United States Army, individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, individually and as Post Exchange Officer, Fort Jackson, South Carolina, Complainants,

v.

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as members of and constituting the South Carolina Tax Commission, Defendants

(Argued January 31, 1941. Decided March 31, 1941.)

Before Parker, Circuit Judge, and Hayes and Lumpkin, District Judges

Claud N. Sapp, United States Attorney, (Louis M. Shimel, Assistant United States Attorney, Samuel O. Clark, Jr., Assistant Attorney General, Sewall Key, Andrew D. Sharpe, Berryman Green, Special Assistants to the Attorney General, on Brief) for Plaintiffs, and

Honorable John M. Daniel, Attorney General for South Carolina, and Claude K. Wingate, General Counsel, South Carolina Tax Commission, for Defendants.

OPINION—Filed April 1, 1941

[fol. 79] LUMPKIN, District Judge:

This is an action brought by the United States, and the Commanding General and Post Exchange Officer of Fort Jackson, South Carolina, for a declaratory judgment and to enjoin the members of the South Carolina Tax Commission from enforcing the provisions of Act No. 574, Acts of 1928 of the General Assembly of the State of South Carolina, as amended, with respect to the activities of the United States Army Post Exchange at Fort Jackson.

By stipulation of the parties, it was agreed that if the complainants should prevail with respect to post exchanges,

the relief granted by the Court is to be applicable to the Marine Corps post exchanges, ships' stores, officers' clubs and non-commissioned officers' clubs described in the amended bill of complaint.

A District Court of three Judges heard the case on complainants' application for interlocutory and permanent relief, and it was agreed that the hearing should be on the merits for a final decree.

The action is brought under Section 274d of the Judicial Code, as amended, and under Section 266 of the Judicial Code, interlocutory and permanent injunctions being sought by the complainants.

The question involved is whether under the provisions of Public Act No. 819, 76th Cong., 3d Sess., hereinafter referred to as the Federal Act, the taxes imposed by Act No. 574 of the Acts of 1928 of the General Assembly of the State of South Carolina, as amended, hereinafter referred to as the State Statute, are applicable to and collectible from the United States Army Post Exchange at Fort Jackson, Richland County, South Carolina.

The material facts as they appear in the pleadings and stipulation of the parties are as follows:

[fol. 80] As set forth in the Findings of Fact this day filed herein the Post Exchange at Fort Jackson is created and functions under United States Army Regulations No. 210-65, C-1, and C-3, promulgated by the Secretary of War, under the authority given him by Congress. By these regulations the commanding officer of each post is directed to establish and maintain a post exchange whenever there is need for it, membership in which is limited to companies, troops, batteries, aero squadrons, or other similarly organized units and detachments. The commanding officer of each army post has complete jurisdiction over the conduct of all post exchanges within his command, subject to the general supervision of superior authority, and is held strictly responsible for their efficient operation and for the enforcement of army regulations applicable to post exchanges. Under these regulations sales are made only to officers and enlisted men of the regular army, army nurses, contract surgeons, members of the Reserve Corps while on active duty, officers and enlisted men of the National Guard when in federal service, civilian employees authorized for service abroad, having a status recognized by the

War Department as part of an expeditionary force, and civilians employed or serving at military posts.

The primary purposes of an exchange are to supply troops at the lowest possible prices with articles of ordinary use, wear and consumption not supplied by the Government, to afford them means of rational recreation and amusement, and through exchange profits to provide, when necessary, the means for improving the company messes. The commanding officer of each army post is charged with the maintenance of recreational athletics, entertainments, service clubs, libraries, and community cooperation which are to be centered about the post exchange which provides the financial support necessary for their maintenance. The [fol. 81] post exchange is governed by a council consisting of a post exchange officer and commanding officer or each company, troop, battery, hospital detachment, or similar organization participating therein. The post exchange officer is detailed by the commanding officer and receives no compensation for his services other than his regular army pay.

Under the Regulations of the Secretary of War the duties imposed upon officers in the management of exchange affairs are as binding upon them as any duty to which they may be assigned under competent military authority. Five per cent of post exchange profits, if any, are set aside as a fund which is divided among the organizations which constitute the membership of the exchange, that is, the companies, troops, batteries, squadrons or units and detachments, and not individuals, and the balance is set aside as a portion of the recreation fund for the laying out, preparing and cultivating gardens, for the purchase of books, newspapers, periodicals, stationery, and similar articles for the exchange library, gymnastic appliances, and prizes for athletic sports. These funds belong to no particular individual and those portions which are set aside for the participating organizations having membership in the post exchange are held by such member organizations in trust, subject to the orders of the Secretary of War or congressional command. Where post exchange buildings have not been provided for from funds otherwise available, the commanding officer is authorized to construct temporary buildings by the labor of troops and the use of necessary teams, and such tools, windows, sashes, doors and other material

as can be spared by the Quartermaster Corps of the army. The Post Quartermaster is authorized to sell to the exchange at cost any subsistence stores except exceptional articles, to furnish heating and suitable apparatus therefor for post exchange rooms and buildings, and to provide supplies for interior and exterior illumination. Messages on post exchange business over telegraph, radio, and cable lines owned and operated by the War Department may be transmitted without charge, and penalty envelopes may be used [fol. 82] in the mails in conducting post exchange correspondence. United States Army Regulations specify what books and records shall be kept by post exchanges and the manner of auditing them.

The State Statute imposes a license tax upon every person for the exercise of the privilege of engaging in selling within the State certain articles among them being beer, wine, tobacco products, soft drinks, playing cards, and candy. In addition to the license tax graduated in accordance with the volume of the sales, that Statute necessitates the procurement by the licensee of a license for each place of business operated by him. The Statute is implemented by a power of revocation of license and of seizure of the alleged illicit product together with the seizure of vehicles, not common carriers, bearing such product. A broad regulatory power is vested in the Commission whereunder it is privileged to enter upon the premises of a vendor, whether a licensee or not, and examine his books and records. The Commission is further empowered to promulgate rules and regulations under the Statute, governing its enforcement, the violation of which will result in fine or imprisonment. In addition those persons procuring licenses are required to maintain extensive files recording minutely the transactions allegedly embraced within the Statute. In the instance of the sale of soft drinks the licensee is required to maintain records of all such transactions for a period of not less than two years from the date of each such transaction.

Subsection (a) of Section 1 of the Federal Act provides that no person shall be relieved from liability for payment of any sales or use tax levied by any State on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area. The Act further provides as follows:

[fol. 83] "Sec. 3 (a) The provisions of sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

"(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations or Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy."

The defendants have since January 1, 1941, the effective date of the Federal Act, insisted that the activities of the Post Exchange in reference to the articles enumerated in the State statute are subject to the provisions of that Statute, and have threatened to enforce the provisions of that Statute with respect to post exchange activities at Fort Jackson. The complainants, however, have refused to admit the applicability of the tax imposed by the State Statute, and have directed that no license taxes upon the activities of the Post Exchange be paid to the South Carolina Tax Commission.

We are of opinion that the provisions of the State Statute are not applicable to the activities of the Post Exchange, that the Federal Act does not give to the defendants the power to enforce such provisions against such activities, and that the order of the defendants to enforce the provisions of the State Statute against such activities and their threat to enforce and their attempts to enforce the same constitute an interference with the activities of the United States, and are unconctitutional.

In the case of *U. S. v. Query, et al.*, 21 Fed. Supp. 784, this Court, sitting as a three-Judge Court, passed upon the question of the relationship of a post exchange of the Civilian Conservation Corps with the Federal Government and, holding that a Civilian Conservation Corps post exchange was a federal instrumentality, enjoined the defendants from enforcing the provisions of the State Statute herein involved as against the post exchange. It is contended that [fol. 84] while the Civilian Conservation Corps Post Ex-

change was created by statute, there is no Act of Congress specificially authorizing the creation and operation of Post Exchanges by the United States Army. A study of the history and character of both exchanges leads to the conclusion that there is no difference in their respective functions. At the hearing upon the Bills to establish a Civilian Conservation Corps before the Committee on Education and Labor, U. S. Senate, 75 Cong. 1st Sess., the Director of Emergency Conservation Work recommended a provision in the Bill authorizing the creation of post exchanges "just like the post exchanges the Army possesses" in order that such post exchange should be "on the same basis as the post exchanges on the Army reservation." (Senate Hearings before the Committee on Education and Labor, on S. 2102, 75th Cong., 1st Sess., pp. 48-49.) In compliance with this request Congress provided the statutory authority asked for by the Director for the creation and operation of Civilian Conservation Corps Post Exchanges.

In 1870, (Act of July 15, 1870, c. 294, 16 Stat. 319) Congress directed that the Secretary of War should prepare a system of general regulations for the administration of the affairs of the Army, which, when approved by Congress, should be enforced until altered or revoked by the same authority. In 1875 (Act of March 1, 1875, c. 115, 18 Stat. 337) Congress repealed that part of the Act which required that such regulations be reported to and approved by that body, and authorized the President to make and publish regulations for the government of the Army in accordance with existing laws. On July 25, 1895, post exchanges were established under regulations promulgated by the Secretary of War. Those regulations have the force of law. *United States v. Freeman*, 3 How. 556, 566; *Gratiot v. United States*, 4 How. 80, 118.

[fol. 85] Congressional approval of the creation and operation of Army Post Exchanges will be found in the several appropriation Acts, commencing with the year 1903 until the present time. In 1903 (Act of March 2, 1903, c. 975, 32 Stat. 927, 937-38), Congress appropriated $500,000.00 "for continuing the construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school, library, reading, lunch, amusement rooms, and gymnasium, to be expended in the discretion of and under the direction of the

Secretary of War", and every year thereafter various appropriations for the same purposes were made. In 1933 and 1934 Congress required the balances of disbanded organization funds, amounting to $298,068, which had been derived from post exchange activities covered into the federal treasury. (Act of March 4, 1933, c. 281, 47 Stat. 1573; Act of June 26, 1934, c. 756, 48 Stat. 1224, 1229.)

By the enactment of these statutes from time to time, Congress recognized and validated the *the* functions of the post exchanges, and in effect confirmed and approved the regulations promulgated by the Secretary of War. *Swayne and Hoyt Ltd. v. United States*, 300 U. S. 297.

Support for the views herein expressed is found in the decisions of the Court of Claims and in the long continued administrative practice.

In *Dugan v. United States*, 34 C. Cls. 458, and in *Woog. Admr. v. United States*, 48 C. Cls. 80, the Court of Claims held that a post exchange was an instrumentality of the Federal Government, engaged in the performance of a governmental function. In the *Dugan Case*, the Court held that a post exchange was not liable for federal internal revenue special taxes as a retail liquor dealer, and in the *Woog Case*, the Court held that the failure of a post exchange officer to properly account for post exchange funds [fol. 86] justified a deduction from the pay of such post exchange officer.

The President of the United States, the heads of the various departments of the United States, to whose opinions the courts always give great weight, *N. Y. ex rel. Rogers v. Graves*, 299 U. S. 401, 406, 407, including the Attorney General, the Comptroller of the Treasury, the Comptroller General, the Postmaster General, The Secretary of War, the Secretary of the Navy, and the Commissioner of Internal Revenue, have in many instances held that post exchanges and their predecessors were federal instrumentalities. (Executive Order 6390 February 6, 1934.) (Cir. 54 W. D. 1932.) (21 Comp. Dec. 109; 3 Comp. Gen. 518.) (Cir. 48, W. D., 1933.) (22 Op. Atty. Gen. 426, 428.)

By Executive Order dated February 6, 1934, the President states that "This order shall apply to and include all vehicles owned and operated by the United States Government and by legally authorized instrumentalities thereof, such as post exchanges, company and recreational organiza-

tions of the Army and Marine Corps, and ship's service activities of the Navy; the Panama Railroad Co., and the Republic of Panama," and the Supreme Court held in *N. Y. ex rel Rogers v. Graves, supra,* that the Panama Railroad Company, placed by this order in the same category as post exchanges, was an instrumentality of the United States.

The parties hereto have stipulated that if the complainants should prevail with respect to the issues raised as to the Post Exchange, then the relief granted by the Court should be applicable to the Marine Corps Post Exchanges, Ships' Stores, Officers' Clubs and Non-Commissioned Officers' Clubs described in the amended bill of complaint.

The Court, therefore, holds and declares that the findings herein and the conclusions reached apply to all of the aforementioned Post Exchanges, Ships' Stores, Officers' Clubs [fol. 87] and Non-Commissioned Officers' Clubs.

The issue was raised herein as to whether or not this matter was properly triable before a Three-Judge Court, and this issue should be decided in this opinion.

This is an action for a declaratory judgment and for injunctive relief against an order of the South Carolina Tax Commission applying the provisions of Act No. 574, Acts of 1928 of the General Assembly of the State of South Carolina, as amended, to the Post Exchange at Fort Jackson, South Carolina, and its activities conducted within the Fort Jackson Military Reservation, South Carolina.

This action is instituted pursuant to the provisions of Section 274d of the Judicial Code, as amended. Injunctive relief from the collection of the taxes assailed is prayed for. The amendment of August 21, 1937, to Section 24, First, of the Judicial Code, c. 726, 50 Stat. 738, which reads

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. (U. S. C. Supp. V, Title 28, Sec. 41.)"

is not applicable to this case since it is alleged in the Amended Bill of Complaint and admitted by the defendants'

Answer to the Amended Bill of Complaint that the complainants have no plain, speedy, and efficient remedy at law or in equity in the courts of South Carolina.

The Jurisdiction of the District Court thus appearing, the sole question remaining is whether this Court, sitting as a three-Judge Court, has jurisdiction to consider and decide and to grant the injunctive relief prayed for. We do not [fol. 88] think that it has. This is not a case for a three judge court under section 266 of the Judicial Code, but one to be decided by the District Judge of the District who sits as a member of the three judge court. The attack is made, not upon the constitutionality of the state taxing act nor upon orders of the state tax commission, but upon efforts of the commission to enforce the taxing act against an instrumentality of the federal government in violation of the immunity from state taxation which such instrumentality enjoys under the Constitution of the United States. This, however, is no more than unlawful action on the part of administrative officers, and the constitutionality neither of the state statute nor of an administrative order made under authority of a state statute is involved. Phillips v. United States —— U. S. ——, 61 S. Ct. 480; Ex Parte Bronsford 310 N. C. 354; Ex Parte Hobbs 280 U. S. 168. In reality nothing is involved in this case except the determination of the status of the post exchanges within the meaning of the federal statute; for everyone concedes that the state taxing statute cannot be applied so as to tax a federal instrumentality without the consent of Congress and that the federal statute does not give consent to the taxing of federal instrumentalities.

We are of opinion, for the reasons above stated, that the District Judge of the District has exclusive jurisdiction to pass upon the case; but in as much as the other judges sitting with him are in entire accord as to the findings and decree to be entered, same will be signed by all three judges, so that in the event that it should hereafter be determined that the case was one for three judges under the statute, an appropriate decree will have been entered. In the view that we take of the case, however, it is the action of the District Judge of the District which will give validity to [fol. 89] the decree and same should be considered, not as the decree of a three judge court, but as his decree, from

which appeal lies to the Circuit Court of Appeals and not to the Supreme Court.

Injunction Granted.

(S.) Alva M. Lumpkin, United States District Judge for the Eastern and Western Districts of South Carolina.

I concur:

(S.) John J. Parker, United States Circuit Judge, Fourth Circuit.

I concur:

(S.) Johnson J. Hayes, United States District Judge for the Middle District of North Carolina.

[fol. 90] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

UNITED STATES OF AMERICA; MAJOR GENERAL HENRY D. RUSSELL, United States Army, individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, individually and as Post Exchange Officer, Fort Jackson, South Carolina, Complainants,

v.

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as members of and constituting the South Carolina Tax Commission, Defendants

DECREE—Filed April 1, 1941

This cause coming on to be heard and being heard before the undersigned, constituting a Special District Court of three Judges convened pursuant to Section 266 of the Judicial Code, and the Court having found the facts and made its conclusions of law and filed its opinion in the case:

Now, therefore, for the reasons set forth in the opinion it is

Ordered, Adjudged and Declared, that the provisions of Act No. 574 of the General Assembly of the State of South Carolina, as amended, are not applicable to the activities of

the Post Exchange at Fort Jackson, South Carolina, and it is

Further Ordered, Adjudged and Decreed that the defendants, Walter G. Query, John P. Derham and John G. Richards and their agents and servants, be and they are hereby restrained and enjoined from enforcing against the [fol. 91] Post Exchange at Fort Jackson, South Carolina, any of the provisions of Act No. 574 of the General Assembly of the State of South Carolina and amendments thereto.

And the parties having stipulated that if the complainants should prevail with respect to said Post Exchange, the relief granted by the Court should be applicable to the Marine Corps Post Exchanges, Ships' Stores, Officers' Clubs and Non-commissioned Officers' Clubs described in the amended bill of complaint.

It is

Further Ordered, Adjudged and Declared that the provisions of Act No. 574, Acts of the General Assembly of the State of South Carolina, as amended, are not applicable to the activities of the Marine Corps Post Exchanges, Ships' Stores, Officers' Clubs and Non-Commissioned Officers' Clubs described in the amended bill of complaint, and it is

Further Ordered, Adjudged and Decreed, that the said defendants, Walter G. Query, John P. Derham and John G. Richards and their agents and servants, be and they are hereby likewise restrained and enjoined from enforcing against the other Post Exchanges in this District, the Marine Corps Post Exchanges, Ships' Stores, Officers' Clubs and Non-Commissioned Officers' Clubs described in the amended bill of complaint, any of the provisions of Act No. 574 of the General Assembly of the State of South Carolina and amendments thereto.

(S.) John J. Parker, United States Circuit Judge, Fourth Circuit. Johnson J. Hayes, United States District Judge for the Middle District of North Carolina. Alva M. Lumpkin, United States District Judge for the Eastern and Western Districts of South Carolina.

This the 31st day of March, 1941.

[fol. 92] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

[Title omitted]

NOTICE OF APPEAL—Filed April 16, 1941

To the complainants above named, Claud N. Sapp, United States District Attorney, and Berryman Green, Assistant Attorney General, Solicitors for Complainants:

You will please take notice, That the defendants in the above entitled cause, by their Solicitors the undersigned, have appealed, and do hereby appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the decree dated the 31st day of March, 1941, and filed on the 1st day of April, 1941.

John M. Daniel, Attorney General for South Carolina; Claude K. Wingate, General Counsel, South Carolina Tax Commission, Solicitors for Defendants.

Dated this 5th day of April, A. D., 1941.

[fol. 93] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

[Title omitted]

STIPULATION DESIGNATING RECORD ON APPEAL—Filed April 16, 1941

It is hereby stipulated and agreed between and by Counsel for Appellants and Appellees in this cause that the transcript of record on appeal to the United States Circuit Court of Appeals for the Fourth Circuit shall contain the following:

1. Complaint as Amended.
2. Answer.
3. Stipulation of Counsel as to the facts.
4. Exhibits. Army Regulations No. 210-65, 6-1, and C-3.
5. Findings of Fact and Conclusions of Law.

6. Decree and Opinion.
[fol. 94] 7. Notice of Appeal.
8. This Stipulation.
9. Clerk's Certificate.

And the Clerk of said Court is directed to make up the transcript of record as hereby agreed and stipulated and forward the same to the said Appellate Court.

John M. Daniel, Atty. Gen.; Claude K. Wingate, Attorneys for Appellants. Samuel O. Clark, Jr., Assistant Attorney General; C. N. Sapp, Attorneys for Appellees.

Columbia, S. C. April 12, 1941.

[fol. 95] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 96] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4810

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as Members of and Constituting the South Carolina Tax Commission, Appellants,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, United States Army, Individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, Individually and as Post Exchange Officer, Fort Jackson, South Carolina, Appellees

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia.

DOCKET ENTRIES

May 10, 1941, the transcript of record is filed and the cause docketed.

May 13, 1941, the appearance of Claud N. Sapp, U. S. Attorney, is entered for the appellees.

May 14, 1941, the appearance of Samuel O. Clark, Jr., Assistant Attorney General, and Sewall Key, Special Assistant to the Attorney General, is entered for the appellees.

May 15, 1941, the appearance of John M. Daniel, Attorney General of South Carolina, and Claude K. Wingate is entered for the appellants.

May 20, 1941, brief and appendix on behalf of the appellants are filed.

May 26, 1941, the appearance of Louis M. Shimel, Assistant U. S. Attorney, is entered for the appellees.

June 7, 1941, the appearance of Berryman Green, Special Assistant to the Attorney General, is entered for the appellees.

[fol. 97] Same day, brief and appendix on behalf of the appellees are filed.

ARGUMENT OF CAUSE

June 25, 1941, (June term, 1941) cause came on to be heard before Soper, Dobie and Northcott, Circuit Judges, and was argued by counsel and submitted.

[fol. 98] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4810

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as Members of and Constituting the South Carolina Tax Commission, Appellants,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, United States Army, Individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, Individually and as Post Exchange Officer, Fort Jackson, South Carolina, Appellees

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia. Civil Action

(Argued June 25, 1941. Decided June 27, 1941)

Before Soper, Dobie and Northcott, Circuit Judges

[fol. 99] Claude K. Wingate (John M. Daniel, Attorney General of South Carolina, on brief) for Appellants, and

Berryman Green, Special Assistant to the Attorney General, and Louis M. Shimel, Assistant U. S. Attorney, (Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key, Special Assistant to the Attorney General, and Claud N. Sapp, U. S. Attorney, on brief) for Appellees.

OPINION—Filed June 27, 1941

Per CURIAM:

The District Judge in this case decided that the sales taxes imposed by Act No. 574 of the Acts of 1928 of the General Assembly of the State of South Carolina are not applicable to the activities of the United States Army Post Exchange at Fort Jackson, Richland County, South Carolina. The Act of Congress of October 9, 1940, Public No. 819, 76 Congress, 3d Session, provided that no person shall be relieved from liability for any sales or use tax levied by any State on the ground that the sale or use occurred in whole or in part within a federal area; but the United States and any instrumentality thereof are expressly excepted from the provisions of the Act. The District Judge held that the post exchange at Fort Jackson is such an instrumentality. The action was brought by the United States and certain officers of the United States Army against the members of the South Carolina Tax Commission, and was heard by a three judge court organized for the purpose. The conclusion was subsequently reached, as appears from the opinion of Judge Lumpkin, 37 F. Supp. 972, that the three judge court was without jurisdiction because no attack was made upon the constitutionality of the State statute or the orders of the State taxing authorities, and that nothing was involved in the case but the determination of the question whether the post exchange is an instrumentality of the United States. [fol. 100] It was therefore held that the District Judge had exclusive jurisdiction to pass upon the case and the judgment for the plaintiffs was issued as his act. The judges who sat with Judge Lumpkin concurred in his opinion. We are in accord with the conclusions reached upon the question of jurisdiction, and upon the merits of the controversy, and the judgment is therefore affirmed upon the opinion of the District Judge.

Affirmed.

[fol. 101] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4810

WALTER G. QUERY, JOHN P. DERHAM and JOHN G. RICHARDS, as Members of and Constituting the South Carolina Tax Commission, Appellants,

vs.

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, United States Army, Individually and as Commanding General, Fort Jackson, South Carolina, and Major William R. Tomy, United States Army, Individually and as Post Exchange Officer, Fort Jackson, South Carolina, Appellees

DECREE—Filed and Entered June 27, 1941

Appeal from the District Court of the United States for the Eastern District of South Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed.

June 27, 1941.

Morris A. Soper, U. S. Circuit Judge.

[fol. 102] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

STIPULATION AS TO RECORD FOR USE ON PETITION FOR WRIT OF CERTIORARI—Filed July 18, 1941

It is Hereby Stipulated and Agreed by and between Counsel for the respective parties that the printed record

to be filed with the petition for certiorari in the Supreme Court shall consist of:

1. Appendix to Appellees' brief.
2. Appendix to Appellants' brief.
3. The proceedings in the Circuit Court of Appeals for the Fourth Circuit.

It is further stipulated that the appellants in this case shall cause the Clerk of the Circuit Court of Appeals for the Fourth Circuit to transmit to the Clerk of the United States Supreme Court the original transcript of record now on file in his office, and if the petition for writ of certiorari is granted, a record shall be printed under the direction of the Clerk of the Supreme Court and shall consist of the proceedings in the Circuit Court of Appeals and of such portions of the entire transcript of record certified to the Supreme Court as the respective parties may designate.

John M. Daniel, Attorney General for South Carolina. Claude K. Wingate, Attorney for Appellants. Charles Fahy, Acting Solicitor General Attorney for Appellees.

[fol. 103] July 25, 1941, petition of appellants for a stay of the mandate pending application for a writ of certiorari is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed July 29, 1941

Upon the Application of the Appellants, by their counsel, John M. Daniel and Claude K. Wingate, and for good cause shown,

It is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said Appellants in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date, July 26, 1941.

John J. Parker, Senior Circuit Judge.

[fol. 104] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

ORDER AUTHORIZING CLERK TO USE ORIGINAL TRANSCRIPTS OF RECORDS IN MAKING UP RECORDS FOR USE IN THE SUPREME COURT OF THE UNITED STATES ON APPLICATIONS FOR WRITS OF CERTIORARI

For Reasons Appearing to the Court,

It is Ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further Ordered that a copy of this order be incorporated in said certified transcripts of records.

January 9th, 1941.

John J. Parker, Senior Circuit Judge.

[fol. 105] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 106] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—April 14, 1942

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

The order of this Court dated November 17, 1941, denying certiorari in this case is vacated. The petition for writ of certiorari herein is granted, and the case is assigned for argument on Monday, May 4th, next, immediately following No. 1125, Standard Oil Co. of California vs. Johnson, as Treasurer of the State of California.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 107] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed April 18, 1942

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the consideration of this case on writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted April 14, 1942, the printed record may consist of the following:

1. The entire record filed in this Court except Army Regulations, No. 210-65, 1, and No. 210-65, *C3, both of which may be omitted but will be supplied separately to the Court.
2. This stipulation.

Charles Fahy, Solicitor General of the United States.
Claude K. Wingate, Counsel for Petitioner.

Dated this 18th day of April, 1942.

Endorsed on Cover: File No. 45,947 U. S. Circuit Court of Appeals, Fourth Circuit, Term No. 619. Walter G. Query, John P. Derham and John G. Richards, as Members of and Constituting the South Carolina Tax Commission, Petitioners, vs. The United States of America, Major General Henry D. Russell, United States Army, Individually and as Commanding General, Fort Jackson, South Carolina, et al. Petition for a writ of certiorari and exhibit thereto. Filed September 16, 1941. Term No. 619 O. T. 1941.